

{For use in HUD-Insured MULTIFAMILY AND HEALTHCARE Transactions}

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION

INSTRUCTIONS TO GUIDE FOR OPINION OF BORROWER'S COUNSEL

EXPLANATORY COMMENTS

The Guide for this opinion was originally prepared in 1994 in view of changes in opinion practice as reflected by the ABA Accord and various State law bar reports on opinion letters and has been revised to reflect approximately seven years experience in using the Guide. The principal purpose of this Guide remains to achieve a uniform format which can be utilized throughout the Nation and which will be familiar to HUD counsel in all jurisdictions. Such a standardized format is crucial in an era when less resources are available to the Department; however, it should be emphasized that certain limited changes can be authorized by HUD field counsel as required by local law or by the unique or programmatic nature of the transaction (e.g. refinancing transactions under Section 241 of the National Housing Act). An effort has been made in these revised instructions to specify examples in more (but not all) of those areas where such changes can be authorized. Otherwise, the format of the Guide must be followed and is not open to negotiation. In this regard, revisions cannot be justified because of a particular Opinion having been approved by another HUD field office. The exercise of discretion by one HUD field counsel in unique circumstances cannot become the basis for any modification to the Opinion. Any requested modification must be analyzed on its own merit and in a particular context. In these explanatory comments, the document may be referred to as the "Guide" or the "Opinion," depending upon the context.

The Department regards the Counsel to the Borrower as a crucial, central figure in the process of preparing and executing the legal and administrative documents necessary to achieve a closing in those multifamily rental and health care mortgage insurance programs where a note is endorsed for mortgage insurance by the Department. Please note that pursuant to the overall document reform effort for the multifamily rental and health care closing documents, "Mortgagor" is now referred to as "Borrower" and "Mortgagee" is now referred to as "Lender;" however, those new uses are defined to mean "Mortgagor" and "Mortgagee" as those terms are used in the National Housing Act. Pursuant to 24 CFR Part 24, §24.105(p), attorneys or others in a business relationship with the Borrower are defined as "principals." Counsel to the Borrower has significant obligations to its client (the Borrower), the Lender and the

Department. In part, these responsibilities entail the exercise of due diligence to assure the accurate and timely preparation, completion and submission of the forms required by the Department in connection with the transaction. Further, the Counsel to the Borrower and any other attorneys involved in the transaction should be thoroughly familiar with the regulations, procedures and directives of the Department pertaining to each mortgage insurance transaction in which Counsel participates. The Department takes seriously the preparation and completion of the various documents involved in the mortgage insurance process (most of which are HUD form documents) and cannot overemphasize the importance of the following bolded language which must appear in all documents relied upon by the Department in insuring the mortgage loan:

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: _____

By: _____ /s/ _____

Printed Name, Title: _____

Dated: _____

By: _____ /s/ _____

Printed Name, Title: _____

Dated: _____

[ADD ADDITIONAL LINES IF MORE THAN TWO SIGNATORIES]

Warning

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. §§ 287, 1001,

1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. § 3729; and (iii) administrative sanctions, claims, and penalties under 24 C.F.R parts 24, 28 and 30.

Please note that this certification/warning also appears in the Opinion and cannot be deleted under any circumstances.

Article IX of the UCC was recently revised in virtually all of the jurisdictions in which HUD insures multifamily rental and health care facility loans. It is imperative that Counsel to the Borrower be aware of these changes in State law and that the UCC documentation be prepared so as to comply with HUD requirements and State law. Furthermore, in connection with health care facility closings, it is imperative that the UCC documentation cover the Certificate of Need (CoN) and the license and that these two documents be tied to the security property covered by the mortgage for the duration of the mortgage. Please note that the Opinion has been amended to cover these points. See G, below, for a more specific discussion of UCC securitization and some major changes by HUD with respect to the legal documentation.

With limited State law related exceptions, HUD anticipates that Borrower's Counsel will be able to follow the Guide in rendering an Opinion in virtually all multifamily rental housing closings involving new construction and substantial rehabilitation and there should be few changes in refinancing and health care transactions. Generally, HUD field counsel should not accept Opinions that otherwise substantially or materially deviate from the Guide. Although we understand that attorneys and law firms may have evolved particular styles and forms of opinion, HUD field counsel do not have time to negotiate each and every Opinion for stylistic changes and differences in thinking among opinions committees. It is essential that the Guide be followed in both style and substance in order to ensure a timely closing. The Counsel to the Borrower is expected to complete a draft Opinion for submission to HUD field counsel at least fifteen days prior to the closing along with the other closing documents. Any deviations must be specifically identified (redlined or highlighted) and discussed with field counsel at that time so that the deviations can be resolved prior to the closing. Any material deviation not required by State or local law or otherwise authorized by these instructions must be brought to the attention of the Assistant General Counsel, Multifamily Mortgage Division, by field counsel along with an explanation by Counsel to the Borrower as to the necessity for the deviation.

It was anticipated that the Guide could be utilized in connection with all types of closings: insured advances or insurance upon completion (for new construction or substantial rehabilitation); final closings (for refinancings, etc.). This has proved to be the case and, furthermore, the Guide format has been adapted and used in Transfers of Physical Assets (TPAs) and hospital mergers, for example. However, numerous questions have been raised--particularly in cases involving Section 241 supplemental

loans and the various refinancing transactions under Section 223. Therefore, it is important that the correct options be selected in instances where choices are provided and that appropriate deletions or modifications be made to accommodate unique circumstances or programs. On the other hand, it should be emphasized that this does not authorize field counsel to approve changes to the Guide in cases other than where the Guide is being adapted for a special use, e.g. refinancing or equity loan transaction, TPA, etc. Furthermore, HUD has made an administrative policy decision to not require an opinion by Counsel to the borrower for projects within the "Small Projects Mortgage Insurance Pilot Program (SPP)." A Notice will be issued defining small project and clarifying the parameters of the SPP. The Lender will have the option of requiring an opinion by Counsel to the Borrower if the Lender so elects. It is anticipated that the Certification of the Owner will be expanded slightly for use in the SPP to provide assurances and comfort to HUD in such cases. Otherwise, the Guide or a variation thereof should be utilized in all FHA-insured multifamily rental project and health care facility closings.

The Guide **is not intended to serve as a closing checklist**; therefore, HUD field counsel may update or modify existing closing checklists as necessary to meet constantly changing program needs and handbook instructions and directives. For example, many deletions from the list of Guide documents are appropriate for various types of refinancings, operating loans, equity loans, etc. whereas several additional documents are necessary in the case of loans for health care facilities (e.g. certificate of need, license, etc.), supplemental loans, and certain complex refinancings.

Brackets continue to be used in the Guide to indicate alternate language, insertions, documents, or instructions depending on the applicable facts and underlining is used to indicate blanks that must be completed.

The Guide contains some instructions and definitions and is largely self-explanatory; however, the following expanded instructions and clarifications should provide additional assistance to both private counsel and HUD counsel. The numbers and letters used below relate to the paragraph numbers and letters in the Guide unless page numbers are specifically designated.

Page 1 and Introductory Paragraph:

- Letterhead and date: The Opinion must be on the firm letterhead and dated the date of endorsement of the note by HUD.

- Reference: Data regarding the project (name, HUD project number, and location and the name or title of the Borrower must be accurate and inserted in the appropriate blanks.

•Addressees: The Opinion must be delivered to HUD as well as the Lender to establish the explicit right of each to rely on the Opinion. The Lender's counsel may be relying on the Opinion for certain aspects of its opinion. If so, the Opinion must also be addressed to counsel to the Lender. HUD is aware that recent case law has raised issues about the extent to which a Lender can rely upon such an opinion; therefore, the matter of reliance by the Lender could be clarified by the parties at the outset in jurisdictions where the issue has been raised. Regardless of case law, HUD continues to believe that this is a unique transaction where the federal interest as insurer of the Lender is clear from the outset and that it is as a result of the unique federal requirements that Counsel to the Borrower is retained to represent the borrower in such a fashion that the Opinion rendered by Counsel to the Borrower necessarily must be addressed to, and relied upon by, HUD as the insurer of the Lender and the Lender in order for the loan transaction to go forward. In cases where counsel to the Lender **elects not** to rely upon the Opinion or Counsel to the Borrower does not wish to permit reliance by counsel to the Lender, the Opinion should not be addressed to and/or delivered to the Lender's counsel. Furthermore, Lender and counsel to the Lender **are not permitted** to rely upon the Opinion with respect to the certification by the Lender that the closing documents, which are mandated by HUD forms and models, comport with the version of such forms and models provided to the Lender by HUD with the exception of the Opinion itself. Counsel to the Borrower must provide such certification with respect to the Opinion.

•Description of the Loan: The loan amount is the original principal amount of the loan being insured unless a modification is necessitated in connection with the closing.

•Source of funds for the Loan: In the second full sentence on page 2 the source of funds must be accurately identified; however, in certain transactions, such as low-income housing tax credit transactions, the source of the funds may not be known at the time the Opinion is rendered. In such cases, a general statement to that effect will suffice. Furthermore, it is important to note that this identification does not have to reach a level of particularity that identifies all individual investors in any case.

List of Documents:

•In General: If there are no brackets around a particular document, the document is one which is commonly used for initial endorsements for insured advances completion cases; however, it should be emphasized that it is impossible to list every document for every insured loan. Further, no attempt has been made to list all documents utilized in all types of refinancings and certain specialized programs, e.g. certificates of need and licenses for health care programs. Conversely, some documents may not be utilized in a particular transaction and should be deleted from the list in the actual Opinion. Brackets around the name of the document indicate that the

document may or may not be used for every loan. If bracketed documents are not used in a particular loan transaction, then delete such documents from the list in the actual Opinion. Each document executed in connection with the loan must be listed by its correct title, showing each party executing it and its date. If documents are dated "as of" a particular date, then such phrase should be included in the description in the text. **It is imperative that care must be taken to compile a list that accurately and completely reflects the transaction in the submission to HUD of the initial draft. After HUD review of the initial draft, the Opinion may have to be modified, as necessary, to satisfy HUD. To the extent documents are later found in the closing docket file which do not comport with HUD requirements and which were not shown on the list, HUD reserves the right to refuse to accept or recognize the documents unless the documents are brought into compliance with HUD requirements. This should be explained to the Borrower when reviewing the Regulatory Agreement with the Borrower.**

All documents executed in connection with the loan transaction must be listed regardless of whether the document is required by HUD or whether the Borrower is a party to the document. It should be emphasized that Counsel to the Borrower is not assuming responsibility for the content of documents that Counsel does not prepare and/or that the Borrower does not execute. The review is necessary to provide assurance of consistency from document to document. The appropriate HUD or FHA form number, if applicable, must be indicated in parenthesis after each document

A. Organizational Documents: All of the Organizational Documents must be reviewed and care should be taken to ensure adherence to the HUD guidelines and directives pertaining to such documents as set forth in the appropriate closing handbooks and instructions.

G. In the original version of the Guide, the requirement that HUD be named in the Financing Statements as a secured party or as its interests may appear was standardized through requiring the insertion of appropriate language in the Security Agreement. The purpose was to clarify that, under certain circumstances, HUD may assert some rights in the personalty arising under the Regulatory Agreement which would precede an assignment of the Security Instrument. Based upon experience to date, a decision has been made that HUD need not be so named in the Financing Statements filed in the name of the Lender-of-Record; however, it should be emphasized that a separate set of Financing Statements must now be filed in the name of HUD placing HUD in a secondary position with respect to all personalty except certain health care receivables in cases where such receivables cannot be pledged to a private lender. In the case of such receivables, HUD must be placed in a first position. **It is the responsibility of the Lender to ensure that such Financing Statements and Security Agreements are properly filed in the name of said Lender and HUD. The procedures may vary depending upon whether the jurisdiction has enacted the new Article IX of the UCC or not. Counsel to the Borrower must check to ensure that the Lender has**

properly filed such Financing Statements and has properly structured the Security Agreement(s). Increasing value and volume of major moveable equipment in the health care area and increasing problems with receivables, the Certificate of Need (CoN) and the license make it more imperative that there be specificity in the UCC documentation with respect to the securitization of such personalty. HUD has made an effort to give HUD maximum contractual protection with respect to the personalty under the newly revised Regulatory Agreement for 232 facilities; however, this does not diminish the need to describe the personalty with specificity in the UCC documentation. With respect to health care facilities, the Security Agreement(s) must cover all personalty, including equipment (with major moveables being described with specificity). Further, all receivables must be specifically described as well as the Certificate of Need (CoN) and the license. Please note that the receivables, CoN and license must all be securitized in favor of the Lender-of-Record (and HUD as appropriate) regardless of whether the facility is operated by the Borrower or by a lessee. This is a major departure from prior practice in some offices and its significance cannot be over-emphasized.

J. Building Loan Agreement: This document is a "bracketed document" which should only be used in cases involving new construction or substantial rehabilitation. Hence, the document is not required in equity loan transactions and most refinancing transactions and many supplemental loan transactions.

K. Construction Contract. See J. above.

L. Mortgagee's Certificate: It has been argued that this document is unnecessary in the context of certain insured secondary loan transactions because the form is used to document the first Lender's consent to the second loan. In insured secondary loan transactions, it should be emphasized that a Mortgagee's Certificate is obtained that is like the Mortgagee's Certificate obtained in a new construction closing. It has nothing to do with the consent of the first lender to the secondary financing transaction. In secondary financing cases (such as under Section 241) where the consent of the first lender is obtained for a second Security Instrument insured by HUD, a separate document (for which there is no specified format) is utilized.

Regardless, the Mortgagee's Certificate is executed by the lender making the loan being insured, which in the cases at issue would be the lender making the second loan, and is one of the most significant closing documents. HUD places great reliance upon the Mortgagee's Certificate and considers it necessary to reveal all fees, side transactions, etc. Furthermore, the document now contains a certification that the closing documents conform to the HUD-approved format except for changes approved by field counsel. In this regard, the document is crucial to HUD's endorsement of the note for insurance. Counsel to the Borrower is not responsible for the execution of the document and only needs to review the document in the capacity as Counsel to the Borrower to be certain that the document conforms to the transaction the Borrower is

agreeing to and that the document accurately reflects the fees and escrows, etc. that are required of the Borrower.

It should be noted that the Mortgagor's Certificate has been eliminated and the substantive provisions have been incorporated into the Regulatory Agreement

P. Certification of Owner: Several persons have questioned whether the references in Paragraph 6 to the Public Entity Agreement and the Regulatory Agreement should be changed so that both refer instead to the Public Entity Agreement. The references should not be changed because HUD wants assurance that there will be no violations of the Regulatory Agreement as a result of events that have occurred with the passage of time; however, the language has been clarified to eliminate several ambiguities. Some types of PEAs may also involve a regulatory agreement and the certification is being clarified to cover both the HUD Regulatory Agreement and the local one.

Q. UCC searches: The UCC Search must be conducted within thirty days of closing and can be conducted by either the title insurance company, a reputable document search firm, the Counsel to the Borrower or any other attorney licensed in the jurisdiction.

R. Flood insurance receipt: Arguments have been made that this document is not necessary in equity loan, supplemental loan and refinancing transactions. Flood plain maps change. In insuring a first or a second Security Instrument, it is just as significant that HUD know whether the property is located in an area where flood insurance is required and, if so, whether the insurance is in effect regardless of whether a prior HUD-insured first Security Instrument is in effect. HUD would not necessarily have the data on file, and it was determined that this is a matter which Counsel to the Borrower could confirm under item (f) near the end of the Guide. Note that no opinion is required, and the factual determinations necessitated by the Guide are considered within the usual duties of Counsel to the Borrower.

S. Title Insurance Policy: Currently the 1992 ALTA Format (with appropriate endorsements) is required by HUD in most jurisdictions.

T. Evidence of zoning compliance: The evidence of zoning compliance will vary depending on the circumstances. The evidence should establish that the building, if constructed according to plans and circumstances, will comply with all zoning requirements. The evidence may be in the form of a letter or certificate from the appropriate local official stating that, if the building is constructed according to the plans and specifications submitted for review, the building will comply with all zoning requirements. In refinancing cases where no construction is involved, the evidence may be in the form of a letter certifying that the existing building(s) is (are) in compliance with

outstanding zoning requirements or, if not, the nonconforming variance, etc., is acceptable. If the locality has no zoning ordinance, a letter should be submitted from the chief executive stating such. In those circumstances, it may be necessary to obtain a letter from the local planning body of the county in which the project is located, that the proposed development is compatible with the county's comprehensive plan. If the zoning approval is based upon a variance or other special action, the closing may have to be delayed until the time for appeals has run. In extremely complex cases, an opinion may need to be obtained from legal counsel specializing in local zoning matters. Such letter must be attached as an exhibit and referenced in the appropriate paragraphs of the Opinion.

In cases involving refinancings, it has been suggested by some attorneys that HUD should have zoning information on hand either as a result of the closing of the first HUD-insured loan or due to periodic site reviews. HUD would not normally maintain data pertaining to local zoning law and the data with respect to the first loan would only be valid with respect to the closing date of that loan. Paragraphs 7, 8 and 9 of the Opinion contain several options with respect to local zoning law. It is important that HUD be assured that there have been no changes in the land use or zoning which would adversely affect the continued use of the property as a rental housing project. In this context, we reemphasize that the attorney responsible for this matter must be licensed in the property jurisdiction.

U. Building permit(s): If no building permit is required, this document is not applicable and should be deleted from the Opinion. (This would also be true with respect to occupancy permits (under V.) unless new permits are required under local law in connection with "pure" refinancing transactions.)

V. Permits required for the operation of the project: Several practitioners have argued that the documentation is unnecessary in refinancing transactions; however, they have not indicated whether such a position would affect their wording of Paragraph 4 of the Guide. In all cases, HUD is concerned that any permits required for the continued operation of the project be proper and in place such that an opinion can be rendered with respect to Paragraph 4. It is crucial in existing projects that HUD be assured that no new requirements have been imposed which would thwart continued operation of the project. If no such permits are required, Paragraph 4 should be amended accordingly. This is a matter that Counsel to the Borrower, as a specialist in the property jurisdiction, should be able to ascertain.

W. Surveyor's plat or survey: The survey must be signed, sealed and dated within 90 days of the closing. In certain refinancing transactions, a survey would not normally be required because no new construction would have taken place and, presumably, nothing would have changed with respect to the building(s) and the site. In such situations, if there is other satisfactory evidence that no site changes have

occurred, an administrative waiver would necessitate the deletion of the item from the Opinion. See X. below. If the borrower's attorney were to become aware of any changes, this would have to be addressed in the Opinion and a survey could be required by HUD depending upon the circumstances.

X. Surveyor's Report: Unless there is a title endorsement protecting against any encroachments, etc., there will have to be a surveyor's certificate indicating that nothing has changed since the last survey with respect to encroachments, lot line violations, construction activity, etc. HUD should not be incurring the risk of insuring any loan if there has been any action which would impair the lender's and HUD's respective positions. As an alternative to a surveyor's certificate, the borrower's attorney could rely upon an appropriate certificate from a qualified architect and insert appropriate language in the Opinion.

Z. Assurance of completion (bonds or agreement): This documentation (now bracketed) would not be utilized in a pure refinancing or equity loan transaction and, therefore, would only be used in cases involving some construction where the regulation pertaining to assurance of completion is applicable.

AA. Owner-Architect Agreement: This document (now bracketed like Documents J and K) should only be indicated (where the Guide indicates "{**INSERT DESIGN AND/OR CONSTRUCTION ARCHITECT**}") in cases involving new construction or substantial rehabilitation.

BB. Off-Site Bond or Agreement: This document should only be used in cases where off-site work is involved. As such, the document would not normally be used in pure equity loan transactions or in refinancing transactions involving no construction.

CC. Assurance of utility services: These documents do not pertain to pure Section 241(f) equity loan transactions and certain refinancing transactions and, therefore, should be deleted in those instances.

FF. Escrow Deposit for On-Site Improvements: If any such improvements are required in connection with an equity loan, supplemental loan or refinancing transaction, the form document specified should be tailored to the situation as determined by field counsel. In a situation where such an escrow is necessary, Counsel to the borrower should modify the form as necessary and present it to field counsel for review.

GG. Contractor's Prevailing Wage Certificate: This item is no longer required in the HUD closing checklist; therefore, some attorneys have taken the position that it can be eliminated from the Opinion. HUD's position remains that the item should be

reviewed by Counsel to the Borrower for the purpose of assuring consistency between the documents and performance under the Construction Contract to which the Borrower is a party.

KK. Public Entity Agreement: The references to this document and to the Regulatory Agreement in Paragraph 6 of the Certification of Borrower have created some confusion about whether the reference to the Regulatory Agreement should be changed to Public Entity Agreement. The two separate references were intended; however, a clarification has been made as discussed in P. above.

LL. Bond Documents: This does not include all documents involved in the typical bond financing. It does include those principal documents such as the Prospectus, the Indenture, a sample Bond, etc. All documents executed by the Borrower or which establish or describe any obligations of the Borrower must be included.

NN. Certificate issued by architect or other professional: Normally such a document would not be necessary in the case of a pure Section 241(f) equity loan and certain refinancing transactions and should be deleted unless those circumstances mentioned under the last sentence pertaining to Document X, above, make the certificate appropriate. Note that "Certificate" is a defined term and that the Certificate can come from "an architect or other professional." Consequently, there is no form for the Certificate and HUD field counsel should defer to HUD administrators specializing in architectural and engineering matters in determining the acceptability of the Certificate. It is referenced in Paragraph 9 of the Opinion and should not be confused with the Zoning Certificate that is also a defined term and is referenced in Paragraph 8.

OO. Docket search: The Docket Search can be conducted by either the title insurance company, a reputable document search firm, the Counsel to the Borrower or any other attorney licensed in the jurisdiction. Arguments have been made by private counsel that such a docket search is not necessary in all transactions. One of the main purposes of the new Guide was to clearly define the work to be performed by Counsel to the Borrower. It was determined that such a search was within the scope of the fees permitted as a Security Instrument line item. Such a search is important in the case of an existing subsidized project where matters of public record could reveal circumstances wherein it would be inadvisable for HUD to go forward with insuring another loan.

An argument has also been made that several record searches in separate jurisdictions could be necessitated in some cases and that this would cost a significant amount of money with little benefit. As the Guide was being developed, HUD was cognizant of such a scenario; however, the benefit to HUD of establishing that the public records are clear outweighs the costs to the borrower of conducting such searches. In the case where a sole-asset borrower is being created, however, a search of the public

records in the jurisdiction where the borrower is located (assuming a different location from the others iterated) is unnecessary. The Opinion could be amended in those instances to indicate that particular state of facts; however, all of the other searches would have to be done.

Opinions:

1. This paragraph contains several options depending upon whether the Borrower's organizational documents were prepared by Counsel rendering the Opinion and the type of borrower entity. Care should be taken to ensure that the correct option is selected and that the requisite information is inserted correctly. It is intended that, where the borrower entity or general partner of the borrower entity is established by Counsel to the Borrower, no reliance on other sources is permitted and Counsel must opine as to the due organization of the Borrower. If a Certificate of Good Standing is not available in the State, but an equivalent document is (i.e., Certificate of Existence), then the bracketed language must be revised to reflect the name/title of the equivalent document so obtained. Any Certificate of Good Standing or equivalent document issued by the applicable governmental authority must be dated no more than 30 days prior to the date of the Opinion of Borrower's Counsel. If the Borrower is a foreign corporation or partnership, the Opinion must recite the review of all government approvals required to do business in the Property jurisdiction. If a Certificate of Good Standing or equivalent document cannot be obtained from the applicable governmental authority (e.g., for general partnerships, then the Borrower's attorney will be required to do the due diligence necessary to give the opinion or may engage other counsel to render such opinion). If the Property jurisdiction is not the State of formation for the borrower entity, Counsel must also opine that the Borrower is qualified to transact business in the Property jurisdiction. Such opinion may be made solely on the basis of a certificate from the applicable governmental authorities of the Property jurisdiction, and if Counsel is relying on such certificate(s), then the opinion must expressly identify those certificate(s) and they must be attached to the Opinion as an exhibit. If the Borrower is an individual, paragraph one should be deleted from the Opinion.

2. This paragraph provides, among other things, that the Borrower possesses all the necessary governmental certificates, permits, licenses, qualifications and approvals to own and operate the Property. This particular provision has generated considerable controversy--particularly where health care facilities are being constructed or substantially rehabilitated in large, urban jurisdictions having a multitude of regulatory requirements pertaining to ownership and operation. Consequently, field counsel have discretion to permit a modification in which Counsel to the Borrower itemizes those local governmental requirements which have been evaluated and indicates that, after due diligence inquiry and insofar as the attorney is aware, these local requirements comprise the entire universe of such requirements. The Opinion should further state that, based upon such itemized local requirements and compliance therewith (with all permits,

certificates, etc. being itemized), the Borrower possesses the power and authority necessary to own and operate the Property and to carry out all of the transactions required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA commitment. In many instances involving new construction, some items such as a certificate of occupancy will not have been obtained by the time of closing. In such instances, field counsel have discretion to permit an appropriate clarification with respect to that particular instrument.

11. If the Borrower or any principal of the Borrower is involved in any litigation or there is any litigation pertaining to the Property, all such litigation matter(s) must be disclosed in writing to HUD field counsel in order that the Department can determine whether the endorsement of the loan is possible. Note that litigation involving a principal of the Borrower must be disclosed. Confusion has developed when there has been litigation involving lower tiers of a partnership. If the issue cannot be resolved through reference to the definition of "principal" in the 2530 regulations, HUD field counsel should consult with HUD program administrators and determine whether the litigation should be disclosed. If the litigation involves compliance with civil rights requirements, it must immediately be brought to the attention of appropriate Fair Housing and Equal Opportunity personnel (regardless of whether a "principal" or some lesser component of the Borrower is the subject of the litigation).

13. If any UCC Financing Statements have been filed on the Personalty in conjunction with any transaction other than the Loan, they must be identified to the HUD field counsel as well as details with respect to how such Financing Statements will be terminated at the time of closing.

If the property is an elderly housing project or a health care facility or if the loan otherwise is to be secured by significant amounts of personal property, the matter should be discussed with field counsel. In the event further discussion is necessary, field counsel should contact the Assistant General Counsel, Multifamily Mortgage Division. For projects in which the personalty is mostly household appliances (e.g., refrigerators) or a limited quantity of smaller equipment, the Opinion will be limited as shown. In other instances, the Opinion may have to be expanded particularly with respect to ensuring that items such as receivables, income stream, etc. are security property. Some examples of such expansion are indicated in the new format because of omissions in the past with respect to projects insured by HUD under Section 232 and 242. Further it should be noted that Lender is now required to prepare, have HUD properly execute and file UCC financing statements showing HUD as a secured party in a second position to Lender and in a first position as to certain health care receivables in which a private lender cannot hold a first position. Either a separate or Lender's Security Agreement (depending upon the law of the jurisdiction) will have to also reflect this new requirement.

One or more UCC searches performed not more than 30 days prior to the date of the Opinion must be made and attached to the Opinion.

15. If the Borrower is a trust (other than a land trust), then Paragraph 15 must be included in the Opinion. The second sentence need only be included if the trust was formed in a jurisdiction other than the Property jurisdiction.

16. This Section has been modified to clarify that taxable as well as tax-exempt bond financing is covered and that other third-party source of funds financings are also covered.

Acceptability of Counsel:

- Counsel to the Borrower must opine as to the law of the Property jurisdiction and must also opine as to the law of the State of Borrower's organization, if different from the Property jurisdiction. HUD requires that Counsel to the Borrower be admitted to practice law in each jurisdiction in which such admission is required by the laws or ethical considerations of the bar to be able to give the opinion. If multiple jurisdictions are involved, two opinions may be required: one with respect to the organization of the Borrower and another with respect to the real property and loan issues. A combination of the Borrower's regular Counsel and special local counsel may be required to satisfy this requirement. If Counsel's satisfaction of these requirements is not evident from the letterhead of the firm, the field counsel should include a written explanation in the Washington docket. In all events, each provision in the Guide must be addressed whether one or more opinions is required to do so.

Signatures:

- The Opinion may be signed by an authorized attorney(s) of the law firm, in the name of such attorney(s).

Certification of Borrower:

- A form of Certification of Borrower is attached. The form represents the minimum amount of information that should be obtained from the Borrower (but additions, revisions and rephrasings are acceptable so long as the Borrower is certifying as to factual matters and not legal conclusions). Please note that one significant addition to the certification is that Counsel to the Borrower has reviewed and discussed the terms of the Regulatory Agreement with the principals (as defined in the HUD regulations) of the Borrower entity. A certification has been added wherein the Borrower either certifies that there are no side-deals, or discloses any side deals in the Certification. The Certification of Borrower must be dated the same date as the Loan Documents.

Identity of Interest:

- Numerous issues have been raised with respect to the confirmation in (d) of the penultimate paragraph of the Guide. A decision was made that the attorney signing the Opinion could not have an identity of interest with any party to the transaction. No waivers are possible in such instance. In instances where other members of the firm have an interest in the Borrower or another entity involved in the transaction, such interest must be disclosed and such interest must be acceptable to field counsel based upon the ethics rules of the applicable bar. Furthermore, any interest must be administratively acceptable to HUD, and 2530 clearance must be obtained. In addition, there appears to be an increasing trend wherein Lenders are insisting upon using counsel to the Lender to handle many aspects of the transaction even though the Opinion is being signed by a separate attorney. There have been some instances where counsel to the Lender has asked to represent the borrower in whole or in part and to provide all or a part of the Opinion. Confirmation (d) has been clarified to reflect the intent of HUD from the inception of the Opinion that any such representation of both parties is not permitted notwithstanding State or local ethics rules.

- Please note that a new confirmation has been added to provide comfort to HUD that there is no identity of interest between the Borrower and the Lender in MAP transactions. HUD imposed this new MAP requirement and it is most important that Counsel to the Borrower explain this to the Borrower as well as the necessity of an accurate representation by the Borrower in the Borrower's Certification to Counsel. This requirement is not applicable to transactions processed under traditional processing and the requirement should be deleted in such cases.

Liens:

- Confirmation (f) contains a statement that there are no liens or encumbrances against the Property. Several attorneys have objected to making the statement because they indicate that, at the time of closing, there may be liens that have actually not been released even though the title company has received funds and/or release documents to do so and intends to process the release after the closing. Except in cases involving the insurance of secondary loans, HUD is only authorized to insure first mortgages; consequently, there cannot be any liens and encumbrances on the property when HUD endorses the note for insurance. As a result, there cannot be any liens outstanding which would prime the insured loan. Hence, Paragraph (f) should not be changed.

Certification as to Regulatory Agreement:

A new confirmation has been added as (g) wherein the Counsel to the Borrower confirms through a certification to HUD that Counsel to the Borrower has

reviewed and discussed the terms of the Regulatory Agreement with the principals (as defined in the HUD regulations) of the Borrower entity. This certification parallels a similar certification by the Borrower and is deemed necessary to avoid certain principals asserting they were unaware of the requirements of the Regulatory Agreement when HUD attempts to enforce the terms of the Regulatory Agreement against them.

Certification as to Side-Deals:

A new confirmation has been added wherein Counsel to the Borrower confirms that, based upon the Certification by the Borrower and to the best of Counsel's knowledge, there are no side deals except as indicted in such Certification.

Reliance on other opinions:

The issue of proper wording and format has probably surfaced most often in cases where Counsel to the Borrower is relying on opinions issued by other attorneys. This has occurred most often in cases involving a separate opinion for bond financing documentation, property jurisdiction vs. organizational jurisdiction, zoning, etc. In this area, it is imperative that Counsel to the Borrower specifically reference and attach the additional opinion(s) and that such opinions track the language of the Guide as close as is practical under the circumstances. HUD field counsel should exercise discretion in this area, taking the unique circumstances into account.

Reliance on Opinion by subsequent holders of Note:

In the dialogue with the lending industry pertaining to revision of the various closing forms, the lenders made the suggestion that HUD consider the approaches taken by Freddie Mac and Fannie Mae. After a comparative analysis, HUD was the only one of the three which took a position that the Opinion could not be relied upon by subsequent holders of the Note. The 1994 HUD format merely required that the Opinion be made available for informational purposes to prospective purchasers. HUD determined that it would be desirable to permit reliance by subsequent holders in order to simplify and reduce the cost of certain refinancings, modifications, etc. The last paragraph of the current format of the Opinion has been modified to permit such reliance.